JD–95–03
Winona, MN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MILLER WASTE MILLS, INC.
D/B/A RTP COMPANY

and Case 18–CA–16411–1

UNITED AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS
INTERNATIONAL UNION, AFL–CIO–CLC

A. Marie Simpson, Esq.,
for the General Counsel.
Paul J. Zech, Esq.,
of Minneapolis, MN,
for the Respondent.
Richard L. Kaspari, Esq.,
of Minneapolis, MN,
for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. On April 25, 2002, the United Automobile, Aerospace & Agricultural Implement Workers International Union, AFL–CIO–CLC, Union herein, filed a charge in case 18–CA–16411–1 against Miller Waste Mills, Inc., d/b/a RTP Company, Respondent herein.

On July 30, 2002, the National Labor Relations Board, by the Regional Director for Region 18, issued a complaint which alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, when, without giving prior notice and opportunity to bargain with the Union, Respondent unilaterally implemented changes in cost and coverage of health care benefits provided to all unit employees.

Respondent filed an answer in which it denied that it violated the Act in any way.

The parties to this litigation, i.e., General Counsel, Respondent and Charging Party agreed upon a stipulation of fact with attached exhibits, waived trial before an Administrative law Judge, and requested that they be provided the opportunity to submit briefs.

Upon the entire record in this case, to include briefs submitted by the General Counsel, Respondent, and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

At all material times, Respondent, a Minnesota corporation, with an office and place of business in Winona, Minnesota, has been engaged in the manufacture and non-retail sale and distribution of thermo plastic molding compound.

Respondent admits and I find, that Respondent at all material times has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that UAW Local 2340, affiliated with the charging party, has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

A. Background

The complaint alleges and the evidence establishes that Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes in unit employees' terms and conditions of employment, without bargaining with the Union. Respondent violated Section 8(a)(1) and (5) of the Act when, on May 1, 2002, it unilaterally implemented changes to unit employees' health insurance coverage and out-of-pocket costs without bargaining with the Union at a time when it had a duty to recognize and bargain with the Union over any changes in unit employees' terms and conditions of employment.

In its answer, Respondent offered as affirmative defenses, that it had a good faith belief that the Union had lost majority support, and therefore it was authorized to withdraw recognition from the Union, and that the Union waived, through action and inaction, any right it may have had to bargain over the unit employee health insurance changes implemented on May 1, 2002.

From 1984 through February 11, 1996, the Winona Free Union represented employees of Respondent for purposes of collective bargaining. On February 11, 1996, members of the Winona Free Union voted to affiliate with the United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO-CLC. Since 1996, UAW Local 2340, the Local Union, has been the exclusive collective bargaining representative of Respondent's employees in the following unit:

> "All production and maintenance employees employed at its plant in Winona, Minnesota; excluding office and clerical employees, engineering department employees, draftspersons, laboratory employees, plant clerical employees, and all guards and supervisors as defined by the National Labor Relations Act, as amended."

Following the affiliation vote, Respondent refused to recognize the Local Union and charges were filed with the Board. On October 1, 1996, Administrative Law Judge William L. Schmidt issued a decision finding that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union following the affiliation vote. On February 20, 1997, the Board affirmed Judge Schmidt's decision. 323 NLRB 15 (1997). Thereafter, Respondent agreed to comply with the Board's Order and Respondent began bargaining with

the Local Union. The Union and Respondent met over a ten-month period from April 30, 1997 through February 26, 1998, in an attempt to negotiate a collective bargaining agreement.

On February 26, 1998, Respondent again withdrew recognition from the Union. A charge was filed in Case 18–CA–14768 alleging that Respondent committed numerous unfair labor practices, culminating in its February 26, 1998 withdrawal of recognition from the Union, all in violation of Section 8(a)(1) and (5) of the Act. A complaint issued and a hearing was held. On September 22, 1998, Administrative Law Judge Arthur J. Amchan found that Respondent had committed unfair labor practices, including a determination that, on February 26, 1998, Respondent unlawfully withdrew recognition from the Union. On July 11, 2001, the Board affirmed the decision of Judge Amchan. 334 NLRB 466 (2001). In addition to concluding that Respondent unlawfully withdrew recognition from the Union, the Board also concluded that Respondent unlawfully bypassed the Union and dealt directly with Unit employees regarding health insurance coverage and premiums. The Board's Order included a bargaining order as a remedy for Respondent's unlawful withdrawal of recognition from the Union.

In August 2001, the Board sought enforcement of its Order before the Eighth Circuit Court of Appeals. On January 10, 2003, a panel of the Eighth Circuit, in a unanimous ruling, enforced the Board's bargaining order. (Joint Exh. 4) Respondent has filed a petition seeking certiorari review by the United States Supreme Court of the Order of the Eighth Circuit Court of Appeals. The Supreme Court has not as yet ruled on the petition for certiorari.

Respondent and the Union are currently engaged in contract negotiations.

Health insurance benefits, both the cost to unit employees, as well as, the coverage provided, has always been a subject of great interest to the Union. In fact, health insurance benefits were an issue during the contract negotiation that took place between the Union and Respondent from April 30, 1997 through February 26, 1998. See, Joint Exh. 2, page 7, line 30 (Judge Amchan's decision).

When no agreement was reached and Respondent unilaterally withdrew recognition from the Union, a complaint issued in case 18–CA–14768 alleging, in part, that Respondent unlawfully withdrew recognition from the Union and subsequently bypassed the Union and dealt directly with Unit employees regarding health insurance coverage and premiums. In his decision Judge Amchan found that Respondent violated Section 8(a)(1) and (5) as alleged. In that case the evidence established that on June 1, 1998, after withdrawing recognition from the Union and discontinuing all contract negotiations, Respondent unilaterally created a second health insurance option for unit employees through Blue Cross and Blue Shield of Minnesota, in addition to the major medical plan previously offered to unit employees. At the same time Respondent unilaterally reduced premium costs for unit employees. Although the Union filed a charge alleging that Respondent violated the Act by dealing directly with unit employees regarding their health insurance benefits, the Union did not specifically object or demand bargaining regarding these changes.

Between May 1, 2000 and April 30, 2002, Respondent maintained the plans it had established in June 1998. During this same period, premium increases were implemented for unit employees. Respondent did not provide notice to the Union of these changes and consequently, the Union did not object to the premium increases or demand bargaining. During most of this time, specifically from August 2001 until January 2003, the Board Order referenced above in 18–CA–14768 was pending before the Eighth Circuit Court of Appeals.

On April 1, 2002, Respondent sent a letter to the Union notifying the Union that Respondent intended to implement health insurance plan changes, and premium rate increases on May 1, 2002. Also on April 1, 2002, Respondent sent to the Union and simultaneously posted at its facility, two documents summarizing the changes to health insurance plans and premiums (Joint Exh. 5).

On April 9, 2002, Union attorney Richard Kaspari sent a letter to Respondent's attorney Paul Zech demanding that negotiations take place prior to Respondent's implementation of changes to unit employees' health insurance coverage and premiums. In response to the Union's bargaining demand, Respondent's attorney Paul Zech stated that Respondent would not negotiate with the Union regarding the changes to its health insurance plans.

On April 25, 2002, the charge in this case 18–CA–16411–1 was filed by the Union. On May 1, 2002, Respondent implemented the health insurance changes summarily described in the documents distributed to the Union and to unit employees on or about April 1, 2002.

Respondent acknowledges that at all times relevant to the proceeding, it has failed and refused to negotiate with the Union regarding the May 1, 2002 changes to unit employees' health insurance coverage plans.

B. Analysis

Health care benefits are mandatory subjects of collective bargaining. See e.g., *United Hospital Medical Center,* 317 NLRB 1279, 1281–1283 (1995); *Compu-Net Communications,* 315 NLRB 216, 222 (1994). Accordingly, an employer whose employees are represented by a union cannot unilaterally change any material element of its represented employees' health care coverage unless the union clearly and unmistakenably waives its right to bargain about such changes. *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983), *Compu-Net Communications,* supra. Respondent argues that a standard not as severe as "clear and unmistakable waiver" be adopted. I disagree and will follow the ruling of the U.S. Supreme Court and numerous Board decisions.

An employer who unilaterally changes a matter that is a mandatory subject of bargaining violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). Since insurance benefits for active employees are mandatory subjects of bargaining, an employer's unilateral modification of such benefits constitutes an unfair labor practice. *Chemical Workers v. Pittsburgh Glass,* 404 U.S. 157 (1971). Any material, substantial, or significant changes made by an employer to an employee's health insurance benefits is considered a violation of Section 8(a)(1) and (5) if that employer has not first provided the employees' bargaining representative notice and an opportunity to bargain. *Pioneer Press*, 297 NLRB 972, 976 (1990); *United Hospital Medical Center*, supra. In this case Respondent furnished notice of the proposed changes but no opportunity to bargain.

Respondent has admitted that it had a duty to bargain with the Union at the time it announced the May 1, 2002 insurance benefit changes (Stipulation page 2, line 3-4). Respondent also concedes that after it announced the intended changes in unit employees' health insurance benefits, the Union demanded bargaining over the issue (Stipulation of Fact, page 4, paragraph 1, Joint Exh. 6). Respondent refused to bargain with the Union regarding the announced health insurance benefits (Stipulation of Fact, page 4, paragraph 2). On May 1, 2002, Respondent implemented changes to unit employees' health insurance benefits (Stipulation of Fact, page 4, paragraph 4). The changes unilaterally implemented by Respondent are material changes. Respondent offered unit employees two health insurance

plans, one identified as Triple Gold and another entitled CMM. The implemented changes included an increase in out-of-pocket maximums for single employees who choose the Triple Gold plan from $800 to $3000. The implemented changes include a similar increase in out-of-pocket maximums for married employees, from $1600 to $6000. Respondent also increased prescription co-pays under the Triple Gold plan from $8 to $14 for single coverage and from $12 to $28 for family coverage. Emergency room co-pays increased under Triple Gold from $40 to $60. The changes to the plan identified as CMM include increases in deductibles and increased prescription co-pays (Joint Exh. 5, page 2). Respondent also increased employee contributions for health care coverage (Stipulation of Fact, page 3, last paragraph; Joint Exh. 5, pages 1 and 3).

The implemented changes to employees' health insurance benefits concerned mandatory subjects of bargaining, and were not de minimis in nature. At the time the changes were announced and implemented, the Union was the exclusive representative of Respondent's unit employees. Respondent affirmatively rejected the Union's timely demand to bargain concerning the health insurance changes. On May 1, 2002, Respondent implemented the changes announced to the Union and all unit employees on April 1, 2002. Respondent suggests in its April 1, 2002 communications to the Union and unit employees that the changes to employees' health insurance are a direct result of rising health insurance costs. At no time did Respondent provide or offer any supporting information to the Union, nor was evidence submitted into the record in this case, to support a claim that Respondent was authorized to act unilaterally based upon compelling economic considerations. *Cypress Lawn Cemetery Assn.,* 300 NLRB 609, 628-629 (1990).

Respondent asserts in its answer to the complaint that its actions did not constitute a violation of the Act because the Union lost majority support in February 1998 and Respondent was authorized to withdraw recognition. The Union was as a result of the loss of majority support no longer the exclusive collective bargaining representative of unit employees and therefore Respondent had no duty to bargain with the Union about the health insurance benefit changes at issue herein.

These same assertions were raised by Respondent and rejected in Case 18-CA-14768, first by Judge Amchan on September 22, 1998, then by the Board on July 11, 2001, and finally, on January 10, 2003, by a unanimous panel of the U.S. Court of Appeals for the Eighth Circuit. As noted above Respondent filed a petition seeking certiorari review by the U.S. Supreme Court which is still pending. Nevertheless, Respondent and the Union are currently engaged in negotiations for a collective bargaining agreement.

An affirmative defense raised by Respondent is that the Union waived, through action and inaction, any right it may have had to bargain over the unit employee health insurance changes implemented on May 1, 2002.

Waivers of statutory rights are not merely inferred, but must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). The law is unambiguous. Even in cases where a union clearly acquiesced in an employer's previous unilateral changes in terms and conditions of employment, that union has not irrevocably waived its right to bargain over such changes in the future. *Midwest Power Systems, Inc.,* 323 NLRB 404, 406-407 (1997). The Board has consistently held that where a Union failed to protest or demand to bargain over previous unilateral changes to the very same benefit at issue, no waived will be inferred. *Air Vac Industries,* 282 NLRB 703 (1987). While an employer may not be required to bargain prior to making modifications to health insurance benefits consistent with an established past practice, such as a practice of requiring employees to pay 20% of costs, no such pattern exists

in this case. *The Post-Tribune Company*, 337 NLRB No. 192 (2002). Where a Union is provided timely notice of an Employer's intent to modify a term of condition of employment, the Union must act with reasonable diligence, and request bargaining.

The facts in this case provide no support for Respondent's defense that the Union waived its right to bargain regarding the health insurance changes at issue herein. To the contrary, the facts provide uncontroverted support for the conclusion that the Union did not waive its right to represent unit employees concerning the announced changes to health benefits. Respondent appears to rely upon the fact that the Union failed to object or demand bargaining when Respondent made changes to unit employees' health benefits in 1998, and increased unit employees' premium contributions in 2000 and 2001. Respondent makes this claim, fully aware that in February 1998, Respondent withdrew recognition from the Union and from that date until a date after January 10, 2003, Respondent continued to refuse to recognize and bargain with the Union. Even if the failure to object to previous health benefit changes supported a finding that the Union waived its right to bargain regarding future health benefit changes, Respondent cannot in good faith assert that the Union's failure to demand bargaining during this time constitutes a waiver. The fact is within one week of receiving notice, the Union unequivocally demanded bargaining regarding the health insurance changes announced on April 1, 2002. Respondent, consistent with its position since February 1998, rejected the Union's demand.

Respondent maintains in its brief that "… the UAW stepped into the shoes of the WFU and inherited an established collective bargaining agreement between the parties. The record, however, is devoid of any details as to the expired agreement's terms and the ALJ in the instant case is left without any indication as to whether at the time of the insurance change announcement, the Respondent's intended modifications were inconsistent with the expired contract's terms. When an employer with a collective bargaining relationship is accused of violating Section 8(a)(5) by implementing a unilateral change after the expiration of an applicable collective bargaining agreement, the analysis should properly be on whether the employer was, through the change, actually deviating from the expired agreement's terms.

If, for example, announced and implemented changes were not in conflict with the expired agreement's terms or were with respect to a matter not otherwise covered by the expired agreement, the Company arguably has not made a unilateral change from the parties' established agreement. Because counsel for the general counsel has not established any change that is inconsistent with the expired agreement's terms, the burden of proof as to a Section 8(a)(5) violation has not been met."

This position appears inconsistent with the signed Stipulation of Fact entered into by the parties, to include Respondent, which provides, in part, that all the parties "… agree that all relevant facts and evidence necessary for a decision in Case 18–CA–16411 are contained in the Stipulation of Fact and the attached documents."

In any event this is a case of Respondent refusing to bargain about a mandatory subject of collective bargaining and a review of Jt. Exh. 5 reflects very substantial changes were made to the health benefits of Respondent's employees.

On the basis of the foregoing and the record as a whole it is clear that Respondent has violated Sections 8(a)(1) and (5) of the Act.

Remedy

The remedy of this violation should be a cease and desist order, the posting of a notice, an order that Respondent upon the Union's request reinstate the health insurance plans and costs in place prior to May 1, 2002, and make all current and former unit employees whole for any losses they suffered as a result of Respondent's unlawful action.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 2340, UAW, Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented changes to the health benefits of its unit employees without giving the Union an opportunity to bargain about the changes.

4. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Miller Waste Mills, Inc., d/b/a RTP Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing changes to the health benefits of unit employees without first affording the Union an opportunity to bargain about the changes.

(b) In any like or related manner inferring with, restraining, or coercing employees in the exercise of the rights guaranteed them by law.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union immediately rescind the unilateral changes made to the health benefits of unit employees on May 1, 2002 and make the employees whole for any losses they have suffered as a result of the unlawful unilateral changes.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Bargain in good faith with the Union before implementing any unilateral changes to the health benefit plan of its unit employees.

(c) Within 14 days after service by the Region, post a copy of the attached notice marked "Appendix" at its facility in Winona, Minnesota.[2] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 11, 2003

_____
Martin J. Linsky
Administrative Law Judge

[2] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BAORD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD–95–03
Winona, MN

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally implement changes to the health benefits of unit employees without first affording the Union an opportunity to bargain about those changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal law.

WE WILL upon request by the Union rescind the unilateral changes made to the health benefits of our unit employees on May 1, 2002 and make our employees whole for any losses they may have suffered as a result of our unlawful unilateral changes.

WE WILL bargain in good faith with the Union before implementing changes to the health benefit plant of our unit employees.

MILLER WASTE MILLS, INC. D/B/A
RTP COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

330 Second Avenue South, Towle Building, Suite 790, Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.